Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-463

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MEYERS INDUSTRIES, INC.,
Petitioners,

V.

KENNETH P. PRILL
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF GRANT OF WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA SUPPORTING GRANT OF WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in Internal Revenue regulations. It is located on the campus of the South Texas College of Law in Houston and shares personnel and activities with the law school. It has expertise in the presentation of issues of economics and related public policy to the courts.

LFA has frequently appeared as amicus curiae in cases involving labor issues both in this honorable Supreme Court and in lower courts. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case made by Petitioner Meyers Industries, Inc.

PRELIMINARY STATEMENT

Respondent Prill is not without a remedy if his claim is valid. State law of wrongful discharge covers his situation. *See Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984) and cases therein cited, *Id.* at 396-97. Michigan, the State here in question, has squarely recognized such a claim. *Sventko v. Kroger Company*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) (recognizing "public policy" exceptions to "at will" doctrine in instances of complaints of statutory violation). As is entirely appropriate, Michigan limits the claim to effectuate its chosen public policy. *See, e.g., Ohlsen v. DST Industries, Inc.*, 111 Mich. App. 580, 314, N.W.2d 699, 702 (1981) (if exclusive remedy is provided by statute, that remedy, rather than common law wrongful discharge suit, must be used).

In other words, Prill can sue for reinstatement and damages under state law here. That is appropriate, since what he has charged his employer with, in this case, is the primary violation of state highway laws.

Instead, however, Prill seeks to federalize the tort of wrongful discharge, to make it an omnipresent remedy for alleged violations of state policy in the workplace, and to pre-empt state law governing individual employment. This Court has had occasion in the past to resist such federalization of the law of torts. *E.g., United Brotherhood of Carpenters & Joiners v. Scott*, 103 S.Ct. 3352 (1983) (refusing to apply civil rights laws to class-motivated mass assault, in part because of need to avoid a general federal tort law).

In this case, the NLRB refused to federalize or pre-empt the States' diverse laws of wrongful discharge. This action was proper because, as Judge Bork observed below, if it had done otherwise it would have protected a wide variety of individually motivated work stoppages under a federal labor law of broad coverage, reading the "in concert" requirement out of the Act. That result would have caused great harm, for the reasons set out in Part II of this brief. Yet it is precisely the result that the court of appeals directed the NLRB to consider.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW REQUIRES THE BOARD TO TAKE ACTION THAT WILL PRODUCE AN INTOLERABLE CONFLICT BETWEEN THE CIRCUITS.

The court of appeals remanded this case to the National Labor Relations Board because of what it considered to be the Board's failure to "exercise the full measure of administrative discretion granted to it by Congress." *Prill v. NLRB*, 755 F.2d at 942. Yet it is clear from the Board's opinion that it has in fact exercised its discretion, and it is hard to imagine what the Board could do, short of reversing its decision, to convince the court. Given the court's undisguised disapproval of the Board's decision, *see id.* at 957, it becomes clear that the decision produces conflict among the circuits.

The decision thus mandated by the court of appeals conflicts with the Ninth Circuit's interpretation of the Act, which coincides with the Board's holding here. *Pacific Electricord Company v. NLRB*, 361 F.2d 310 (9th Cir. 1966) (per curiam). The decision similarly conflicts with the Fourth Circuit's determination that the activity must at least "look to" group action to be protected. *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 306-307 (4th Cir. 1980).

The decision also conflicts with the decisions of this Court, which has itself held that the "in concert" requirement does not authorize the Board to address situations of purely individual action. *E.g., International Rice Milling Company v. NLRB*, 341 U.S. 665, 670-71 (1951) (construing then-existing in concert requirement of section 8(b)(4) as "expressly limited to the inducement or encouragement of *concerted* conduct by the employees" and "aimed at concerted," as distinguished from individual, conduct) (emphasis in original); *Emporium Capwell Company v. Western Addition Community Organization*, 420 U.S. 50 (1975) (individual efforts to address alleged racial discrimination not protected under labor law because not concerted, but possibly protected under other laws).

These conflicts are not minor, nor are they tolerable nor avoidable. They mean that a truck driver may be protected in purely individual actions in the District of Columbia, but if he travels to work for the same employer in the Ninth or Second Circuit, he is not. Worse, it leaves the NLRB in a state of confusion and conflicting directives. The decision below would authorize the Board to prohibit discharge upon every one-employee work stoppage if only the matter at issue is "of concern" to other employees, even if all others refuse to endorse the conduct and indeed reject it. The importance of this issue has required this Court to consider the subject recently in a narrower context in *NLRB v. City Disposal, Inc.*, 104 S.Ct. 1505 (1984). The case at bar presents more substantial questions than *City Disposal*, because it raises the general problem, rather than raising the narrow circumstance of a collective bargaining agreement specifically authorizing the work stoppage at issue.

The court of appeals' remand to the Board to exercise its expertise cannot avoid the conflict, because its expertise to interpret the Act is precisely what the Board did exercise, in this very case. The relevant question is whether the Board's interpretation of the Act is reasonable. But beyond that consideration, the court of appeals clearly forces the Board to acknowledge the existence of individual conduct that can trigger satisfaction of the in concert requirement, an acknowledgement that the Board must withhold to comply with the decisions of other circuits. The problem is of intense importance to both employers and employees.

Given the persistence of the problem in numerous, finely shaded decisions by both the courts and the NLRB over the years, [1] given the Board's unsuccessful efforts to rationalize deci-

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1 The tortuous history of the decisions can be seen in Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. PA. L. REV. 286, 339 (1981). Gorman's conclusions are not here relied upon, however, for the reasons given in infra note 2.

sions under its prior standard, [1a] and given the fact that the Board's decision that is here reversed merely represents a return to its earlier standard, [1b] the conflict is of the kind that most calls for this Court's review.

II. THE DECISION OF THE COURT OF APPEALS PRESENTS SUBSTANTIAL QUESTIONS THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT. IN PARTICULAR, IT PRESENTS THE QUESTION WHETHER A REQUIREMENT OF ACTUAL CONCERTED ACTIVITY, AS OPPOSED TO "CONSTRUCTIVE" CONCERT, IS BASED UPON SOUND POLICY REASONS THAT ARE TO BE FOUND IN BOTH THE LEGISLATIVE HISTORY AND THE CASE LAW.

The court of appeals' reasoning was essentially that a *constructive* concert requirement could substitute for an actual one. This reasoning itself presents a substantial question that

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1a See supra note 1. The difficulty is highlighted by comparing the court of appeals' decision here with its decision in Kohls v. NLRB, 629 F.2d 173 (D. C. Cir. 1980). There, on strikingly similar facts, the same court found no concerted action. The employee had refused to drive a truck on the claim that its brakes were unsafe.

1b Before its abberational decision in Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), the Board adhered to its approach in this case. E.g., M.F.A. Milling Co., 26 N.L.R.B. 614, 626 (1940); Panaderia Sucesion Alonso, 87 N.L.R.B. 877, 880-81 (1949) (concerted activity must be "that of more than one employee"); Hunt Tool Co., 192 N.L.R.B. 145, 146 (1971) (discharge for filing workers compensation suit not violative of federal labor law).

should be decided by this Court. Amicus would show the Court, here, that an actual concert requirement serves the goals of the Act, in ways that are important enough to call for this Court's consideration.

1. *The "in concert" requirement increases the probability that protected activity will advance matters of significant concern to employees generally, rather than idiosyncratic preferences.* Without a concerted action requirement, a single employee would be able to make his own idiosyncratic interpretation of the interests of workers and to further the interests he thus chooses, regardless of the opinions of others. But the Congressional debate indicates clearly that the NLRA was intended to further a more democratic process,[2] in which concerns that were relatively widely shared were raised and negotiated through representatives of workers acting in concert.[3] The requirement

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2 References to industrial "democracy" as resulting from the Act are to be found throughout the legislative history. See Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. PA. L. REV. 286, 339 (1981) (hereinafter cited as Gorman). Gorman concludes (erroneously, it is submitted) that protection of "democracy" refers to protection of unilateral individual action, and this conclusion leads him in turn to argue that individual action is protected without active or "constructive" concert—a position even the Board does not endorse. "Democracy" clearly implies discussion, majoritarianism, and group action, contrary to Gorman.

3 The "democracy" was contemplated as being exercised primarily through collective bargaining and other representative mechanisms. See Emporium Capwell Co. v. Western Addition Community Organization, 420 U. S. 50 (1975); NLRB v. R. C. Cola, 328 F.2d 974, 978-79 (5th Cir. 1964). See also National Labor Relations Act section 1 (declaration of purpose).

of actual concert makes it more likely that the disputes that consume the efforts of both labor and management will be significant and legitimate ones.

In this regard, we respectfully disagree with the lower court's implicit assumption that a single-employee, on-the-spot work stoppage must necessarily affect others positively, or that it is likely to work to the benefit of all. The bulk of the Board's cases clearly show otherwise. In many of the Board's decisions on this issue, the employee is actually trying to take rights from other employees or to give less pleasant work to his fellows, and he attempts to force adoption of his view by fiat—through a unilateral work stoppage. [4] In other Board cases, the employee has sought to shield his own nonperformance from employer response. [5] There is no basis for the assumption that a decision by one employee to take action he alone deems appropriate will work to the benefit of all, and it contravenes the fundamental assumptions of the Act.

2. *The "in concert" requirement increases the probability that the protected activity will involve a valid, true complaint, and it decreases the likelihood of pretext.* A constructive concert approach would not require that the single employee complaint it protects be true or valid or supported by the collective agreement. It need not even be probably valid; in fact, it need not even be *possibly* valid. All that such an approach would require is that there be some basis from which some one among many employees *might* conclude, in his own mind, that the complaint

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4 See cases cited in note 15 infra and accompanying text.

5 For example, in NLRB v. Buddies Supermarkets, 481 F. 2d 714 (5th Cir. 1973), protracted negotiations were followed by a single employee's persistent efforts to set aside an outcome other employees deemed beneficial. The Board considered this conduct concerted; the Court of Appeals did not, and it denied enforcement. See also authorities cited in note 7 infra.

is well founded.[6] Since most employees can find a way of stating personal complaints in terms of purported safety concerns, comfort, working conditions, or similar arguments, an extension of *City Disposal* here would openly encourage pretextual complaints.

The Board's decisions disclose that the giving of pretextual explanations for claimed protected activity is a real and frequent problem.[7] The requirement of actual concert, of course, would not eliminate pretext, but if a complaint must be shared by several workers and acted upon by them together, the probability of pretext decreases.

3. *The "in concert" requirement sharpens the articulation of the dispute and focuses it.* The approval of individual work stoppages would encourage hasty and thoughtless action, in which a single employee may unilaterally decide on the spot to stop work and nevertheless frustrate any reasonable employer response. If several employees must act in actual concert, there is greater likelihood of careful formulation of the disputed issue, simply because they are likely to share the concern or discuss the action among themselves first. Furthermore, the complaint is more likely to be communicated in a manner that will lead to its peaceful resolution.

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6 John Sexton & Co., 217 N. L. R. B. 80 (1975); T & T Industries, 235 N. L. R. B. 517 (1978). In these cases, the Board "threw its protective net broadly, holding that section 7 protection applies even if the employee's complaint is ultimately found to lack merit." Gorman 284. As Gorman puts it, with reference to the Interboro doctrine, "[T]he Board makes no pretense that the individual's complaint must be . . . anchored in the labor contract; it will be deemed concerted activity whether or not the . . . contract actually supports the claim. . . ."

7 E.g., Indiana Gear Works v. NLRB, 371 F. 2d 273, 276 (7th Cir. 1967) (employee's action motivated by personal malice toward employer, not by claimed concern for general equity in wages). As Gorman demonstrates, the board's decision was not based upon

An example of the adverse effect of a non-concerted approach is to be found in *Indiana Gear Works v. NLRB*, [8] in which an employee publicly posted sarcastic cartoons with his own captions, cruelly and personally ridiculing the company president. He acted alone, because his fellow employees, though asked, refused to join him. He thus adopted a most counterproductive method to communicate his concern. Nevertheless, the Board ordered reinstatement (a holding based upon constructive concert); the Court of Appeals—correctly, it is submitted—denied enforcement. Concerted action would have been more likely to produce a dispute better focused toward resolution.

4. *The "in concert" requirement ultimately fosters labor peace.* The single most important policy underlying the adoption of the NLRA was the goal of labor peace.[9] The "in concert" requirement, for the reasons given above, clearly furthers this Congressional goal. "Constructive concert" would not; indeed, in several of its cases, the Board has regarded conduct as protected even when labor peace has resulted from protracted nego-

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neutral principles, and the reasoning could have supported acceptance of the "pretext" (wage equity) as well as it did the Court of Appeal's actual finding. Gorman 287; see also Northern Motor Carriers, Inc., 130 N. L. R. B. 261 (1961) (malice rather than pretext of working conditions); NLRB v. Lenkurt Elec. Co., 459 F. 2d 635, 638 (9th Cir. 1972) (dictum; same); Krispy Kreme Doughnut Corp. v. NLRB, 635 F. 2d 304 (4th Cir. 1980) (enforcement denied) (Board finding of concert rejected on evidence showing it was pretext for "a preoccupation with filing claims for compensation" and lax safety practices).

8 371 F. 2d 273, 276 (7th Cir. 1967). The Board considered this individual action protected; the Court of Appeals did not, and it denied enforcement. In several other cases, the board has considered as protected such "expressions" as a single employee suddenly halting work for reasons sufficient to him or her. Ontario Knife Co. v. NLRB, 637 F. 2d 840 (2d Cir. 1980) (enforcement denied); NLRB v. Dawson Cabinet Co., 566 F. 2d 1079 (8th Cir. 1977) (enforcement denied).

9 See Section 1 of the Act (statement of purpose). "All the bill does is for the sake of peace and harmony . . . . " 79 Cong. Rec. 7673, ____th Cong., ____ Sess.(1935) (remarks of Rep. Walsh).

tiations only to be followed by a single employee's refusal to accept the negotiated outcome. [10] Furthermore, constructive concert approves the conduct of employees who unilaterally engage in sudden work refusals, [11] even though such "one-person wildcat strikes" would usually be in violation of collective agreements if engaged in by multiple employees in concert. [12]

The lower court concluded that the *City Disposal* reasoning, which involved enforcement of a collective agreement, could be extended to the present situation, which does not. The result, however, would be a grant of power to each of perhaps thousands of employees in a firm to engage in unilateral work stoppages, limited only by the need for some minimal basis for belief and by each individual's own subjective sincerity. As Judge Brown said in *NLRB v. R. C. Cola Co.*, 328 F.2d 974, 978-79 (5th Cir. 1964):

> There cannot be bargaining in any real sense if the employer has to deal with individuals or splinter groups. And just as attempted negotiation with such groups or individuals would make a mockery out of bargaining, so, too, must bargaining by single agency be kept free from divisive pressures generated by dissident elements.

The remarks of supporters of the Act in Congress lead to the same conclusion:[13]

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10 E.g., NLRB v. Buddies Supermarkets, 481 F. 2d 714 (5th Cir. 1973) (enforcement denied).

11 See note 9 supra.

12 Cf. Gorman 355-56: "Most obviously, a no-strike provision . . . should have the same impact on a 'protest stoppage' by an individual . . . . (A) labor agreement will in most instances render unprotected an individual's stoppage . . . . "

13 79 Cong. Rec. 7673 (May 16, 1935) (remarks of Sen. Walshe).

> We are requiring employees to negotiate with the properly designated representatives of their employees in the hope of having peace, in the hope of removing misunderstanding . . . .

Congress sought to *avoid* unorganized work stoppages, not encourage them:[13a]

> National labor policy has been built on the premise that by pooling their economic strength . . . , the employees of an appropriate unit have the most effective means of bargaining . . . . The policy, therefore, extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees.

A grant of authority to each individual employee to stop work for reasons sufficient to him alone is not tailored to these objectives.

5. *The "in concert" requirement prevents idiosyncratic or obstreperous employees from benefitting unfairly at the expense of fellow employees.* A constructive concert approach would not require the employee's conduct to be consistent with fellow employees' interests for it to be protected. It can be motivated entirely by a desire to benefit ones' self at the expense of all others, so long as it "relates" in some manner to working conditions.[14] This approach means that an employee attempting to obtain working conditions that he, alone, considers beneficial, and which are disadvantageous to every other employee in the shop,

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13a Id.

14 E.g., Air Surrey Corp., 229 N. L. R. B. 1064 (1977), enforcement denied on other grounds, 601 F. 2d 256 (6th Cir. 1979); Cf. NLRB v. Interforo Contractors, Inc., 388 F. 2d 495 (2d Cir. 1967) ("It is doubtful that a selfish motive negates the protection").

is nonetheless protected. Indeed, many of the Board's decisions in this area involve single-employee work refusals based on disputes over seniority or similar entitlements, in which the employee is by definition attempting to benefit himself at the expense of his fellows. [15] He may be able to obtain advantages in wages or working conditions merely because he is adamant, when they would be distributed differently if based on unhampered negotiation and agreement. One-employee work stoppages having such an effect are contrary to the most basic purposes of the Act. [16] A requirement of actual concert would not eliminate this result completely, but at the very least it would ensure that the employee must persuade some other workers of his position or involve them before acting on it.

Even a requirement that the action be of "common interest" to employees would not avoid this problem. For example, if an employee refused to drive a truck because it was not equipped with an air bag, he might be sincere and well motivated; indeed, many public interest advocates might agree with him. Only by considering the merits of the complaint, something it should not do, could the Board distinguish such a case from the present case. But to deprive the employer of any reasonable course of action in such a situation would be inconsistent with the Act, which seeks to advance the real, shared concerns of employees expressed as a group.

6. *The "in concert" requirement helps employers to react reasonably to individual employees' poor performance or work habits.* Constructive concert would mean that, if an employee is both a poor employee and a chronic complainer, management

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15 NLRB v. Selwyn Shoe Mfg. Corp., 428 F. 2d 217 (8th Cir. 1970) (employee's insubordination, based on assertation of seniority rights in effort to take work from another employee, held protected as constructively concerted); ARO, Inc. v. NLRB, 596 F. 2d 713 (6th Cir. 1979) (similar; enforcement denied); Ontario Knife Co. v. NLRB, 637 F. 2d 840 (2d Cir. 1980) (similar; enforcement denied).

16 See authorities cited in notes 2, 3, 10 supra.

cannot react to his poor performance without fear that a different interpretation of the facts will produce an unfair labor practice adjudication. Indeed, many of the Board's decisions in this area have involved efforts to distinguish poor performance, backbiting, and insubordination from conduct the Board has considered protected. These cases virtually always involve unpredictable inferences from diffuse and hotly contested facts.[17]

7. *The "in concert" requirement encourages resort to inexpensive alternatives for individual dispute resolution, in preference to an NLRB proceeding.* The decision below encourages resort in the first instance to an NLRB proceeding, which is an adversary trial, followed by all the briefing, findings, and appeals of litigation, with delay before trial and, sometimes, years before decision. In contrast, many employment agreements provide for more expeditious and inexpensive grievance resolution processes.[18] The Board's current practice does not even involve deferring to such contractual procedures.[19] The "in-concert" requirement would not eliminate unnecessary litigation, but it would have greater tendency to confine Board proceedings to matters in which more protracted proceedings are useful.

Harvard University President Derek Bok, himself a labor law expert, has recently criticized certain areas of labor law[20] as "fine-spun applications of vague, even contradictory, principles with no convincing demonstration of how the public interest is

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17 E.g., Ryder Tank Lines, Inc., 135 N. L. R. B. 936, enforcement denied on other grounds, 310 F. 2d 233 (5th Cir. 1962); R. J. Tower Iron Works, 144 N. L. R. B. 445 (1963); see also cases cited note 7, supra. See generally Gorman 289-93, 354 (labelling "chronic complainer" cases "troubling" and stating that they rest on "coincidence of facts.").

18 Cf. Gorman 356-57.

19 Id.

20 Bok, A Flawed System, 85 HARV. MAGAZINE 38, 40 (1983).

served." [20a] Even if not harmful, proceedings under such standards "do cost inordinate amounts of money, time and energy." One definitional question on labor issues, regarding an election, cost Harvard "over a year of effort and more than one hundred thousand dollars." Bok concludes, "Even a rich country cannot afford to spend such sums on issues of this kind." But the lower court's approach would cause proceedings to proliferate.

8. *The "in concert" requirement honors the sound policy in favor of clear definition of jurisdiction.* The doctrine that although "personal gripes" are not protected, self-interested conduct is protected if it is germane to working conditions or to some provision in a collective agreement, is a distinction so ethereal that it enables the Board to reach almost any result in almost any case. As Gorman puts it, the past decisions in this area are characterized by "elusiveness and inconsistency." [21] There is simply no clear distinction that can be made between a "personal gripe" and a "protected self-interested gripe." Sound policy dictates that the jurisdiction of an agency such as the NLRB be clearly defined. The sweep of that jurisdiction was a matter of concern to, and was carefully limited by, the Congress that passed the NLRA.[22]

20a The distinction between "personal gripes" on the one hand, and "selfish" actions germane to working conditions on the other, is such a "fine-spun application," particularly if the NLRB's differentiation of "abusive" or "opprobrious" conduct from that "related to" the collective agreement is added. See note 22 infra.

21 Gorman 299; see generally Id. at 289-310.

22 "Nothing in the language of the Act, nor its legislative history, evidences an intent on the part of Congress . . . to intrude into the day-to-day operation of an employer's business." ARO, Inc. v. NLRB, 596 F. 2d 713 (6th Cir. 1979).

CONCLUSION

The decision below presents conflicts with a number of other decisions. Those conflicts are not minor, tolerable or avoidable. Furthermore, the case presents substantial questions that have not been, but should be, addressed by this Court. The "in concert" requirement serves sound policy. The Congressional debate discloses a number of goals that Congress clearly intended to advance by passage of the NLRA, and these goals in turn are advanced by a requirement of actual concert. The court of appeals' constructive concert approach is in conflict with the achievement of these congressional purposes. The Board's authority to use its expertise is decreased by this decision. This honorable Supreme Court should grant the writ of certiorari.

Respectfully submitted,

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